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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 607

THE DAILY PRESS, INC.,
Petitioner,
vs.
UNITED PRESS INTERNATIONAL,
THE EVENING NEWS ASSOCIATION
and
KNIGHT NEWSPAPERS, INCORPORATED,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on June 20, 1969.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Michigan is not reported. The opinion of the Court of Appeals for the Sixth Circuit is not yet officially reported. It is unofficially reported at 1969 CCH Trade Cases, ¶72,-830. Both opinions are reproduced in the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals was made and entered on June 20, 1969. A copy of the judgment is reproduced in the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

In a civil antitrust action alleging violations of both Section 1 and Section 2 of the Sherman Act based upon the refusal of United Press International to sell all or any of its wire services to the plaintiff, a daily newspaper published during the 1964 Detroit newspaper strike, did the District Court improperly grant the motions for summary judgment of the three defendants, where the court, without hearing argument on the motions:

(i) resolved numerous factual issues in favor of defendants, including the ultimate issue that UPI's refusal to deal was for reasonable business grounds;

(ii) disposed of the case on the ground that plaintiff had failed to prove a classic antitrust conspiracy among the defendants, without considering the allegations that defendants' conduct constituted an unlawful combination in restraint of trade;

(iii) applied incorrect standards as to the elements of the Section 2 charge and failed to consider evidence in support of the allegation that United Press International unilaterally attempted to monopolize and did monopolize trade and commerce; and

(iv) refused to permit plaintiff to complete discovery of relevant information from defendants?

STATUTE AND COURT RULE INVOLVED

The Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U.S.C. §§1 and 2, provides in pertinent part:

> Sec. 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal, . . ."
>
> Sec. 2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ."

Rule 56 of the Federal Rules of Civil Procedure, as amended, provides in pertinent part:

> "[Summary] judgment . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

STATEMENT

This is a civil action to recover money damages for injuries sustained by plaintiff as a result of conduct proscribed by Sections 1 and 2 of the Sherman Act.

Plaintiff published a daily newspaper in Detroit, Michigan, from July 22, 1964, through November 22, 1964, a period during which The Detroit News and The Detroit Free Press were shut down by labor strikes. The defendants are United Press International ("UPI"), one of the two full-service wire services in the United States, and The Evening News Association and Knight Newspapers, Incorporated, publishers, respectively, of The Detroit News and The Detroit Free Press, the two English language daily newspapers of general circulation published in Detroit, Michigan.

The complaint charges that the defendants combined, contracted and conspired to prevent plaintiff from obtaining all or any of the UPI wire services, in violation of Section 1 of the Sherman Act; that UPI, acting alone, unlawfully refused to deal with plaintiff, as part of an unlawful attempt to monopolize and monopolization of commerce in violation of Section 2; and that the three defendants attempted to monopolize and did in fact monopolize commerce by virtue of conduct calculated to prevent plaintiff from purchasing all or any wire services from UPI.

On March 27, 1968, the District Court granted the separate motions for summary judgment of the three defendants, which it had held under submission for approximately one year. These motions were granted without ever permitting plaintiff to present argument to the court, although the trial judge had previously stated in open court that "substantial time" would be given to such argument.

Also, plaintiff was required to oppose the motions without benefit of complete discovery of relevant information from defendants.

Shortly after the 1964 labor strike began against The Detroit News and The Detroit Free Press, plaintiff was incorporated. It published the only general circulation daily and Sunday newspaper in Detroit for the duration of the strike, attaining a circulation of about 250,000 copies (6a, 16a-28a, 274a-275a).[1]

Plaintiff was immediately able to obtain, on short-term contracts, the Reuters News Service and the Dow-Jones financial news wire. The former is a British-based service which features international news and the latter specializes in business and financial news (236a-238a, 307a-309a, 24b-26b). Plaintiff also quickly obtained various nationally distributed features, such as comics, columns and puzzles, all on short-term contracts.

Despite the ease with which the Daily Press obtained Dow-Jones, Reuters and the various services described above, it was unable to obtain the service which it considered most important, UPI (275a-279a). On July 20, 1964, Michael Dworkin, president and publisher of the Daily Press, telephoned the central division office of UPI in Chicago. He spoke to Peter Willett, the assistant central division manager, and advised him of the desire of the Daily Press to obtain UPI service (197a-198a, 358a). Willett said that "he didn't see any reason why [the Daily Press] couldn't have service" (197a-198a). He further stated that he could get the service to the Daily Press within six hours, that UPI had machines available, and

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[1] References to "(a)" are to pages in the Joint Appendix in the Court of Appeals. References to "(b)" are to pages in the Exhibit Volume in the Court of Appeals.

that by that evening UPI could give patchwork service. He then indicated that the Daily Press would have to sign a contract with UPI similar to the contract UPI had with the News and Free Press. His words were: "*We cannot go into a town and service a newspaper on terms different than those we are servicing to the newspaper already*" (198a). Willett added that if the Daily Press could get the News and Free Press to agree to UPI servicing the Daily Press under a contract different from that which they had, then UPI would give the Daily Press the service as soon as it could be installed (198a-199a).

Frank P. Gill, a longtime professional newspaperman and professor of journalism at Wayne State University, who was hired as executive editor of the Daily Press, was informed of this conversation by Dworkin. Gill proceeded to contact the News and Free Press to obtain the clearances which the UPI official had said was necessary (199a, 305a-307a). When contacted by Gill, officials of both newspapers reserved comment. Later, Gill was told by these officials that neither paper wanted to get involved in plaintiff's dealings with UPI (306a-307a, 201a).

Gill then telephoned Alan M. Thomason, the president of UPI, in New York. After explaining the purpose of the call, Gill was told by Thomason that "UPI service would cost the Daily Press $2,480.00 per week, on a five-year contract, with the fifth year paid in advance" (307a). When Gill protested that the terms were absurd. Thomason responded by saying "Those are the regulations. I'd like to be able to do something else, but I can't. *This is our rule*" (307a). Dworkin had already received the same response from Dale Johns, the central division manager of UPI, who said that Dworkin had been "grossly misinformed" about the necessity of the News and Free Press approving service to the Daily Press (201a-202a).

Plaintiff continued in its attempts to buy all or some of UPI's services. At different times, plaintiff sought to buy the news picture wire and the state wire without purchasing other services offered by UPI. On each occasion UPI refused to sell either service separate from other undesired wires (202a, 204a-207a, 218a-219a, 308a-309a).[2]

According to the president of UPI, the rate to be charged to the Daily Press (a morning newspaper) would have been the same as the rate charged to the Free Press (also a morning paper) for comparable service (323a-326a, 355a-357a). This was based on UPI's position that "when a newspaper goes into any town under any condition [UPI], expects that paper to pay the existing rate paid by [UPI's] client in that field in that city" (357a). The rate UPI charged the Free Press at the outset of the strike for the A and B trunk wires, the sports wire and the business wire was $961.78 per week (11b). Nevertheless, plaintiff was told that the service would cost it $2,480.00 per week (307a). And, it was still unable to get any service despite its willingness to pay $3,000.00 per week, payable two weeks in advance, and assume the total cost of installing the receiving machines (207a-208a, 285a-286a).

During the strike period, UPI's news wire contract with the News was for an indefinite term with a one-year cancellation provision (1b-4b). The weekly charge for the news wire service at the beginning of the strike was $1,981.74 (3b).

UPI's local representative, Frank Beatty, called on the Daily Press and told two of its principals, Michael Dworkin

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[2] By Interrogatories 34, 39 and 43 (40a-42a), plaintiff sought to adduce from UPI exactly which services it offered individually and which only in combination with others. UPI objected to these interrogatories. The court did not finally rule on the objections.

and Irving Hershman, "you boys are putting out a damn good newspaper. I would really like to see you get the service" (219a-220a, 287a-288a). He agreed to do his best to see that the Daily Press got UPI service (220a). Beatty's version of the meeting, as reported by him in a letter to Dale Johns dated September 28, 1964, is that he told Dworkin that UPI would require a five-year contract. Beatty told Johns that the Daily Press "wants to buy the service piece-meal at whatever rate we [UPI] want to charge him" (22b). In connection with Dworkin's request that Beatty give him a written statement of UPI's terms, Beatty wrote to Johns as follows:

> "[Dworkin] then asked if I'd give him this in writing and I put him off by telling him I'd ask either New York or Chicago to make it official.
>
> I'm sure you don't want to get into any exchange of letters with this character so why don't we just let it ride. If he calls me again, I'll put him off" (22b).

When the strike began, UPI immediately reduced the charges to the News and Free Press by the physical cost savings of not having to transmit news to them. After three weeks, UPI reduced the charges for the service themselves by ten per cent per week, so that after ten weeks UPI was receiving no revenue from either the News or Free Press (353a, 3b-4b, 6b-7b, 11b).

Notwithstanding that UPI quickly lost approximately $3,600.00 in wire service revenue from the News and the Free Press because of the strike reductions, Thomason stated that one of the reasons UPI refused to deal with plaintiff was because UPI relied upon the permanence of long-term agreements to insure a continuous level of income (349a-350a). However, the record is clear that UPI had contracted with smaller newspapers in the three-

county metropolitan area outside of Detroit, on contracts of much less than five-year duration, including some for as little as six months (12b-16b).[3]

In addition to being unable to purchase the UPI wire services, plaintiff also was unable to purchase individual news photographs from UPI, notwithstanding that Mims Thomason testified that UPI would sell such pictures to the general public on an "a la carte" basis (319a-322a).

A UPI official who at first promised to sell plaintiff photographs of Lee Oswald, President Kennedy and Chief Justice Warren, in connection with plaintiff's publishing of the Warren Commission Report, later refused to deliver, stating that "the pictures had current newspaper value, and they might possibly compete with a newspaper that was . . . . a subscriber to UPI" (317a). According to Mims Thomason, however, UPI was quite willing to sell individual pictures of famous people to anyone who was interested in purchasing them (319a-322a).

Although UPI regularly granted short-term contracts to existing customers, the testimony of Dale Johns indicated that it would not do so with new newspapers (361a-362a, 363a-364a, 369a-370a). Mims Thomason explained the five-year uniform contract requirement of UPI by saying that if one newspaper were given a contract for a shorter term

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[3] During the strike, UPI furnished Ford Motor Co. with a UPI wire at Ford's exhibit at Detroit Metropolitan Airport (213a). This service was presumably on short-term basis. Plaintiff, by interrogatory 11 (34a-35a), sought to adduce the terms by which UPI sold this service to Ford, in order to prove that UPI regularly deviated from the five-year contract requirement in the case of non-competing newspapers. UPI objected to the interrogatory on the ground of relevancy. In support of its objection, UPI stated: "Clearly, Ford was not a competitor of plaintiff or the newspaper defendants or UPI's other customers." The court did not finally rule on this objection, and plaintiff was not given the answer to this interrogatory.

UPI "would be fearful that [existing customers] would then ask for short-term cancellation privilege. If we would extend to one, we would have to do it to others." (354a; see also 354a-355a). This testimony was inconsistent with the record facts that UPI did indeed grant short-term contracts to many existing customers (41b-54b).[4]

The evidence in the record indicates the vital importance of UPI wire services to the success of a daily newspaper, particularly one published in a metropolitan area. The record shows that there are but two domestic services which are considered full range nationwide operations—United Press International and Associated Press (329a-338a). These two services are substantially larger than other services owned by individual newspapers and offer a broader range of news and picture services (329a-338a, 388a-407a). They are vital to the success of daily newspapers (371a-387a). Of the 1599 general circulation English language newspapers published in this country, 1,510 (94.4%) subscribed to either UPI, AP or both, and 1094 subscribed to UPI or AP alone, without additional wire services (368a-407a).

UPI and AP are totally different in organization. UPI is a profit-making corporation operating for the pecuniary benefit of its stockholders (319a). AP, on the other hand, is a membership cooperative owned and controlled by the

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[4] By Interrogatories 20 and 21 (37a-38a), plaintiff sought to adduce facts to prove that UPI granted additional wire service at very low rates to the Cleveland Polish Daily News, an existing subscriber, during the 1963 Cleveland newspaper strike, while at the same time, refusing to deal with the Southwest Press, a new newspaper, on less than a five-year term. The court refused to order answers to these interrogatories on the ground of relevancy. Similarly, plaintiff sought by interrogatory 12 (35a-36a) to determine if UPI sold wire services to any newspaper, radio station or television station in the Detroit area during the 1964 strike, which services had not been furnished prior to the strike. The court refused to order answer on the ground of relevancy.

newspaper subscribers (327a-328a); see also *Associated Press v. United States*, 326 U.S. 1, at 4, 8-10 (1945); *Associated Press v. Taft-Ingalls Corp.*, 340 F. 2d 753 (C.A. 6th Cir. 1965), *certiorari denied*, 382 U.S. 820 (1965). There are membership requirements for admission to AP which would have involved too long a wait for the Daily Press (234a-236a, 305a, 310a, 377a, 51b).

The uncontroverted record facts show that the inability of plaintiff to obtain UPI service severely hampered its efforts to publish a first-rate newspaper. Had UPI service been available to plaintiff, it could have published a newspaper of much higher quality, much earlier in the day, and thereby earned substantially more circulation and advertising income (266a-269a, 277a-278a, 282a-283a, 294a-295a, 513a, 514a).

Moreover, the Daily Press succeeded in earning over $1.8 million in advertising revenue and $1.1 million in circulation revenue (35b-39b, Plaintiff's Trial Court Appendix, p. 607). This represented revenue forever lost to the News and Free Press. And, while the principals of the Daily Press, at the time the paper began, did not contemplate publishing after the strike terminated, the record shows that they did indeed consider other publishing ventures, including publication of a permanent newspaper in the Detroit area (365a-367a, 20b).

REASONS FOR GRANTING THE WRIT

This case involves the confluence of two legal principles which have repeatedly found expression in the opinions of this Court: the importance of private enforcement of the antitrust laws to the economic welfare of this country and the importance of the unfettered dissemination of news to the vitality of our democratic society:

> ". . . Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured but also to vindicate the important public interest in free competition." *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495, at 502 (1969).

> "[The First Amendment] rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not." *Associated Press v. United States*, 326 U.S. 1, at 20 (1945).

The Court of Appeals has ignored both of these principles and, contrary to overwhelming recent authority from this Court on the use of summary judgment procedure in antitrust cases, affirmed a summary judgment for defendants where important issues of fact remain to be resolved and where plaintiff has yet to be heard in a courtroom on the merits of its case.

The opinions of both the District Court and the Court of Appeals center upon the finding that UPI's requirements that plaintiff sign a five-year contract and pay the fifth year's charges (about $125,000.00) in advance were reasonable and merely the valid exercise of UPI's business judgment.

In so ruling, neither court went beyond the mere statement of this ultimate conclusion to examine the uncontroverted facts that (i) UPI regularly deviated from this self-imposed rule in the case of newspapers which were not going to compete with existing UPI customers and (ii) these requirements, in the setting of the ologopolistic wire service industry, could not be justified as the reasonable exercise of business judgment, but instead were part of a pattern of conduct which has effectively prevented new newspapers from obtaining UPI service.

1. The decision of the Court of Appeals is in direct conflict with established antitrust principles and particularly three recent opinions of this Court: *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495 (1969) and *Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969).

The court below disposed of this case on the ground that any supplier, including UPI, can select those customers with which it will deal and it may adopt any terms it desires in dealing with those customers. Thus, the court found that plaintiff was "unwilling to buy on regular UPI terms", which terms the court summarily stamped as reasonable.

While it is quite true that a supplier may generally select its customers and unilaterally determine the conditions upon which it will deal, it is also clear that a refusal

to deal or the imposition of unreasonable terms and conditions may be unlawful where they are used for the purpose of destroying competition or furthering monopoly. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

Although the Court of Appeals was impressed with UPI's claim that it was willing to deal with plaintiff on the same terms as that given to existing customers, the undisputed record facts show that UPI will not deal with any new newspaper on less than a five-year contract with the fifth year paid in advance, although regular customers (i.e. those not posing potential competition to existing customers) are given much more generous terms.

In *Norfolk Monument, supra,* this Court reversed the granting of a summary judgment in an action not unlike the case at bar. In that case both the District Court and the Court of Appeals dismissed out of hand plaintiff's conspiracy and monopolization arguments on the ground that the restrictive rules followed by defendants, which had the effect of foreclosing plaintiff from a segment of the relevant market, were "reasonable" and fully justified by business considerations.

In reversing, this Court said (394 U.S., at 702):

> "But the business justification for these restrictive rules was disputed by the petitioner, who proffered evidence that the markers required very little permanent care and that, in any event the funds for that purpose were already provided from another source. *The reasonableness of the rules was a material question of fact whose resolution was the function of the jury and not of the court on a motion for summary judgment.*" (Emphasis added).

It is this holding which goes to the heart of petitioner's case. Surely, if this Court holds that a retailer of grave markers is entitled to be heard on his claim of unlawful market foreclosure, no less consideration can be given when the only daily newspaper to have published in the nation's fifth largest city is prevented from obtaining wire service by what UPI claims to be its business regulations.

This case involves the public media—an industry impressed with the highest degree of public interest. It is clear that to the extent that the mass media are foreclosed from obtaining news and facts, the public will similarly be deprived of obtaining information necessary to maintain an informed citizenry. It would make a mockery of our antitrust laws to permit the only national proprietary wire service to adopt whatever restrictive policies it chose, label them as its "regulations" and impose them on media which, because of the concentrated nature of the wire service industry, cannot go elsewhere.

The defense of "legitimate business purpose" was similarly urged by U.S. Steel, the defendant in *Fortner*. This Court again recognized that such a defense cannot be determined as a matter of law, and must await trial of disputed factual issues:

> "It may turn out that the arrangement involved here serves legitimate business purposes . . . . But on the record before us it would be impossible to reach such conclusions as a matter of law, and it is not our function to speculate as to the ultimate findings of fact." (394 U.S., at 506).

Moreover, the issues here involved go well beyond the parties and incidents involved in this case, since it is clear that the onerous conditions imposed by UPI upon the newspaper industry have effectively prevented new entrants into the rapidly shrinking newspaper market. (See

50b; 54b; see also Hearings on S. 1312, *"The Failing Newspaper Act,"* Senate Subcommittee on Antitrust & Monopoly, 90th Cong., 1st Sess (1967)).

2. In addition to its claim that UPI had unilaterally violated Section 2 of the Sherman Act, plaintiff alleged that the three defendants engaged in an unlawful combination designed to restrict wire services from new newspapers, in violation of Section 1.

At no point did plaintiff seek to prove a formal agreement among the defendants. Plaintiff did show, however, that the defendants had long-standing relationships by which the News and Free Press were given contract terms far more generous than anything offered to plaintiff; that the newspapers were aware of the fact that new entrants could not get such terms; and that the entire history of the wire service industry is infected with trade restraints held *per se* unlawful by this Court 25 years ago. See *Associated Press v. United States,* 326 U.S. 1 (1945); (339a-347a).

Plaintiff attempted (but was never permitted) to show that such relationships formed the nucleus of an unlawful combination, within the meaning of this Court's opinion in *Albrecht.* Both the District Court and the Court of Appeals made much of the fact that plaintiff's witnesses were unable to testify to direct acts of conspiracy. This is precisely the approach this Court held erroneous in the *Norfolk* case:

> "The fact that the District Court appeared to consider dispositive of the conspiracy allegations was that petitioner's principal officer 'admitted that he has no letters, agreements, correspondence, or any other testimonials to a conspiracy, among the several defendants. . . .' But it is settled that '[n]o formal agreement is necessary to constitute an unlawful conspiracy.' *American Tobacco Co. v. United States* . . . and that *'business behavior is*

> *admissible circumstantial evidence from which the fact finder may infer agreement.'"* (394 U.S., at 703) (Emphasis added).

In failing to consider the full breadth of the proscription against unlawful combinations, as defined by this Court in *Albrecht,* and in holding plaintiff to a requirement of direct proof of conspiracy, the Court of Appeals acted directly contrary to the recent opinions of this Court.

3. In support of its claim that UPI alone had unlawfully monopolized and attempted to monopolize trade, the plaintiff presented to the District Court substantial economic data, collected at great effort and expense, and despite severe limits on discovery. That data showed the dominant and unique position held by UPI in the industry. See *Associated Press v. United States,* 326 U.S. 1, at 13-18 (1945). The wire service industry has seen the creation of no new full-line competitors to UPI or AP. Indeed, UPI itself absorbed one of its major competitors, International News Service.

It is not surprising that there have been no new entrants in the full-service wire service field. By tying up existing newspapers, and indeed all media, with long-term contracts, UPI has effectively prevented any competitor from gaining a foothold in the market. This Court recently noted that long-term contracts exacted by a supplier in a "bottle-neck" position could easily constitute a clog in competition and evidence of unlawful monopoly. In *United States v. Grinnell Corp.,* 384 U.S. 563 (1966), the Court ruled that defendants had unlawfully monopolized the central station property protection services. In part monopoly power was obtained by use of long-term contracts:

> "Two of the means by which ADT acquired and maintained its large share of the market are the *requirement that subscribers sign five-years contracts*

> and the retention by ADT of title to the protective services equipment installed on a subscriber's premises. *On this record it appears that these practices constitute substantial barriers to competition and that relief against them is appropriate.*" (384 U.S., at 578) (Emphasis added).

The District Court disposed of the Section 2 allegations in a brief paragraph which centered on the statement that plaintiff had failed to carry its burden since no conspiracy or combination was established. Of course, this holding is clearly erroneous, since no showing of concerted conduct is necessary to support a charge of monopolization or attempt to monopolize. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

The Court of Appeals did not consider this plain error. Instead, it disposed of the Section 2 allegations on the basis that monopoly power had not been proved.

The simple answer to this is that plaintiff was never given the opportunity to fully and fairly present its case on this ultimate fact question. The record contains ample uncontroverted evidence from which the trier of fact could infer that UPI enjoyed power over price and power to exclude competitors. And, plaintiff was foreclosed on discovery from obtaining any information on UPI's rates which would further support the Section 2 charges.

Surely it was plain error for the District Court to completely deny plaintiff discovery on this crucial issue, and then fault plaintiff for failing to meet its burden of proof.[5]

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[5] Discovery as to UPI's rates was no mere fishing expedition. During the course of discovery facts came to the attention of plaintiff which established that limited discovery of UPI's rates would clearly show monopoly power—the power over price. An affidavit to this effect was presented both to the District Court and Court of Appeals. Neither court addressed itself to this important matter (165a-166a).

The Court of Appeals concluded its discussion of the Section 2 charge by saying that no tie-in was involved because UPI made no contract with plaintiff. This misses the point. Plaintiff was not urging a Section 3 Clayton Act theory. Rather, it sought to prove that UPI's refusal to sell individual wire services and its refusal to deal with plaintiff on reasonable terms were indicia of monopoly power. *Kansas City Star Co. v. United States*, 240 F. 2d 643 (C.A. 8th Cir. 1957), *certiorari denied*, 354 U.S. 923 (1957); *629 Productions, Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478 (C.A. 5th Cir. 1966); *Packaged Programs, Inc. v. Westinghouse Broadcasting Co.*, 255 F. 2d 708 (C.A. 3rd Cir. 1958).

4. In *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), this Court, in reversing summary judgment for defendant, stated:

> "Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." (368 U.S., at 473).

The principle of the *Poller* case remains as the rule to be applied in private antitrust cases. Indeed, this past term the Court on two occasions relied on *Poller* in reversing summary judgments for defendants in private antitrust cases. *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495 (1969) and *Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969).

Although the Court of Appeals decided this case several months after the *Fortner* and *Norfolk* decisions, it did not refer to either. Instead, the court relied upon *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), as authority for affirming the summary judgment in this case.

In *First National Bank,* plaintiff's case rested solely on allegation of conspiracy stemming from a break-off in negotiations between Waldron and Cities Service. Unlike this case, there were no allegations of Section 2 Sherman Act violations, nor any claim of unlawful combination, as in *Albrecht v. Herald Co.*

Plaintiff relied only on the failure to come to terms with the defendant in support of its case. Plaintiff was unable to point to any benefits to be obtained by Cities Service in refusing to deal with him. Defendant was not a dominant factor in the industry and Waldron easily could have dealt with others.

And, even in that situation, the District Court twice refused to grant defendant summary judgment until plaintiff had had an opportunity to complete discovery and present its case.

Ours is not that case. Here the uncontroverted facts prove that UPI regularly granted short term contracts, even during newspaper strikes, to firms who posed no competitive threat to existing UPI customers. But, when a new newspaper sought to enter a market where existing UPI customers had control, the UPI regulations required a five year contract and a cash deposit equal to a full year's service. Contrary to UPI's claim that it treated all customers equally, neither the News or Free Press were obliged to accept such onerous terms. Nor were numerous daily newspapers which circulated outside Detroit (but in the general metropolitan area) required to adhere to those terms.

And, even with the limited discovery permitted plaintiff by the District Court, plaintiff was able to show that it was not alone in being victimized by UPI's pernicious regulations. Other fledgling newspapers died aborning because they were unable to obtain UPI service.

None of these facts were ever considered by the District Court or the Court of Appeals. Clearly, it is these facts which bear directly on the lawfulness of UPI's conduct. Fair justice requires that plaintiff at least be permitted to complete discovery and be heard in court and given an opportunity to present its case to a jury on these critical issues.

Petitioner submits that if private enforcement of the antitrust laws is ever to be meaningful, this Court must make it abundently clear that the principle of the *Poller* case has not been overruled *sub silentio* by *First National Bank,* a decision not mentioned in the *Fortner* or *Norfolk* opinions.

CONCLUSION

Petitioner prays that, in accordance with this Court's decision in *Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc.,* 394 U.S. 700 (1969), the writ of certiorari be granted, the judgment be reversed and the case be remanded to the District Court for completion of discovery and for trial. Alternatively, petitioner prays that the writ of certiorari be granted and the case be set for hearing in this Court.

Respectfully submitted,

EUGENE DRIKER
Counsel for Petitioner

Of Counsel:

ERWIN C. ZIEGELMAN

September 1969.

APPENDIX A

OPINION AND ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT

At a session of said Court, held in the Federal Building, City of Detroit, Michigan, on March 27, 1968.

Present: Honorable Talbot Smith, United States District Judge.

Plaintiff, a Michigan corporation organized on July 20, 1964, published the interim inewspaper known as the "Daily Press" until November 20, 1964, during the pendency of the last strike (not the current one) which shut down Detroit's two major daily newspapers published by Defendant, Knight Newspapers, Inc. (Detroit Free Press) and Evening News Association (Detroit News).[1] Defendant, United Press International (hereinafter referred to at times as U.P.I.) is in the business of gathering news throughout the world and selling the news to newspapers and other information media through wire services.

Plaintiff's newspaper was published throughout the period of the strike and the record is clear that the paper was an interim newspaper the publication of which was to be, and actually was, discontinued upon termination of the strike.[2]

In the latter part of July, 1964, plaintiff attempted to secure wire service from Defendant United Press. Defendant United Press' refusal to furnish such service, for

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[1] The Defendants will generally be referred to by the names of the newspapers published by them.

[2] This undisputed fact has an important bearing on the allegations made by plaintiff and will be discussed *infra*.

what it alleges to be good and sufficient business reasons, gave rise to this anti trust action, which we find (as more fully set forth hereinafter) to be completely without merit. As we noted, upon termination of the strike (November 20, 1964) the Interim newspaper ceased publication, as planned, even before the appearance of the defendant papers. Suit was started on November 20, 1964. Plaintiff alleges that:

> "I. (IV. Beginning in July, 1964, and continuing up to and including the date hereof, the defendants, UPI, Evening News and Knight have contracted, combined and conspired in unreasonable restraint of interstate trade and commerce in the sale of news services, newspapers, and newspaper advertising in violation of Section 1 of the Sherman Act."
>
> "Said defendants have further contracted, combined and conspired to monopolize interstate trade and commerce in the sale of news services, newspapers and newspaper advertising in violation of Section 2 of the Sherman Act."

Plaintiff further alleges that

> "The aforesaid unlawful contracts combinations and conspiracies consist of a continuing agreement, understanding and concert of action among the defendants, UPI, Evening News and Knight, the substantial terms of which are:
>
> (a) That UPI will not sell, lease, or otherwise make available any or all of its wire services to plaintiff or other new daily newspapers of general circulation published in the City of Detroit.
>
> (b) That no new daily newspapers of general circulation published in the City of Detroit, including

plaintiff, shall be permitted to obtain any or all of the wire services of UPI."

Plaintiff alleges, in addition, that

"Defendants, UPI, Evening News, and Knight, have done those things which, as hereinabove alleged, they contracted, combined and conspired to do."

Plaintiff further alleges that

"Beginning in July, 1964, and continuing up to and including the date hereof, the defendants, UPI, Evening News, and Knight, have attempted, individually and jointly, to monopolize and have, individually and jointly, monopolized interstate trade and commerce in the sale of news services, newspapers and newspaper advertising in violation of Section 2 of the Sherman Act."

The aforesaid attempt to monopolize and monopolization have included the following practices on the part of the defendants:

"a) the Evening News and Knight have induced UPI to refuse to sell, lease or otherwise make available to plaintiff any or all of its wire services.

(b) UPI has, without legal justification, refused to sell, lease or otherwise make available to plaintiff any or all of its wire services.

(c) UPI, Evening News, and Knight have agreed that no new newspapers of general circulation published in the City of Detroit shall be permitted to obtain any or all of the wire services of UPI.

(d) Evening News and Knight, individually and jointly, have attempted and are attempting to prevent the creation or continued existence of competing newspapers in the City of Detroit by coercing wire services to refuse to serve such newspapers."

Effects of Illegal Conduct alleged

"By all means of the above described conduct, defendants have unreasonably restrained interstate trade and commerce, have suppressed competition, and have attempted to monopolize and have monopolized, the sale of news services, newspapers, and newspaper advertising."

Plaintiff further alleges that

"More particularly, defendants have prevented and suppressed actual and potential competition between plaintiff and the Evening News and Knight, have denied plaintiff services essential to its present and future success in the newspaper business, have deprived the public of an important source of news, and have denied advertisers the benefit of actual and potential competition between plaintiff and the Evening News and Knight."

"As a result of the aforementioned violations of the federal anti trust laws, plaintiff has been, is presently, and will in the future, be injured in its business, and has lost, is continuing to lose, and will in the future, lose, sales, advertising revenue, good will and profits it otherwise would have gained. In addition, as a result of the aforementioned violations of the federal anti trust laws, the continued existence of plaintiff as a viable newspaper publishing company has been seriously threatened."

All the above allegations are denied by defendants herein.

Defendants have filed a Motion for Summary Judgment alleging that there is no genuine issue of fact respecting plaintiff's charges, nor is there any substantial evidence upon which could be found any illegal actions involving the defendants jointly or singly.

We will note at the outset that we are aware of the teachings of *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 454, and similar holdings in many circuits, including this one (*Southern Blowpipe & Roofing Co. v. Chattanooga Gas Co.*, 360 F.2d 79, 1966) pointing out that summary procedures should be used sparingly in complex anti trust litigation. At the same time we are governed by the provisions of Rule 56 of the Rules of Civil Procedure. Obviously the cases and the rule may be harmoniously construed.

Issues Presented

I. Whether, on the record before this Court, defendants UPI, Evening News and Knight, contracted, combined and conspired in unreasonable restraint of trade to prevent The Daily Press from obtaining any or all of UPI wire services in violation of Section 1 of the Sherman Act. (15 U.S.C. §1).

II. Whether, on the record before this Court, defendants UPI, Evening News and Knight, individually and in combination, have attempted to monopolize and have monopolized trade and commerce by contracting or combining among themselves to deprive plaintiff of UPI service in violation of Section 2 of the Sherman Act. (15 U.S.C. §2).

III. Whether the failure of negotiations between plaintiff and defendant UPI resulted from an unjustified uni-

lateral refusal of UPI to deal with plaintiff in violation of Section 2 of the Sherman Act (15 U.S.C. §2).

On all of the issues presented, on the record before this Court and for the reasons discussed below, this Court finds in favor of defendants herein, and their Motions for Summary Judgment are granted.

Plaintiff admits that there was no agreement and asks this court to supply the agreement from the facts before it. In plaintiff's view, these facts are as follows:

a) it was in defendant UPI's economic self-interest to sell its services to plaintiff

b) UPI acting in concert with defendant newspapers acted against its economic self-interest

c) plaintiff (despite the fact that it admits no plans to continue in business after termination of the strike) was a potential competitor of defendant newspapers.

These "facts" are not supported by the record before us, and certainly cannot supply all of the missing elements which plaintiff needs to complete its cause of action. While these facts may be self-evident to plaintiff, they are clearly not shown by this record nor can they be reasonably inferred from facts in this record.

On page 11 of plaintiff's brief plaintiff sets out some of the essential elements of its cause of action in more detail:

"That in exchange for long-term contracts with UPI, UPI would not permit a new newspaper to obtain UPI service where that newspaper might compete with an existing UPI customer. Admittedly, the record does not disclose such a formal understanding among the defendants. But the reasonable inferences from the

> foregoing facts admit of no other conclusion. UPI, *against its obvious economic self-interest,* refused to sell a commodity, which it had immediately available for sale, to a *potential competitor* of two of its largest customers. This conduct is not the product of unilateral business judgment made in the setting of a free and open market. It can be explained only by the existence of *anti-competitive agreements* designed to thwart the growth of *competing newspapers.*" [Emphasis added.]

Plaintiff alleges in substance that:

a) The Defendant UPI acted in concert with the other defendants

b) Declined to sell its services to plaintiff against UPI's obvious economic self-interest

c) In order to eliminate plaintiff as a potential competitor of two of its largest customers.

We will discuss these points in the order stated.

A) *That Defendant UPI Acted in Concert with the Other Defendants.*

While it is quite true that it is not necessary to show an express agreement among defendants in order to establish a contract, combination or conspiracy within the meaning of Section 1 of the Sherman Act, *American Tobacco Co. v. United States,* 328 U.S. 781 (1946), the plaintiff must allege more than mere conclusory allegations unsupported by the record to state a cause of action.

Plaintiff agrees that the record does not show any awareness on the part of plaintiff's executives of the existence of a formal conspiracy but argues that these same witnesses

"unequivocally testified to the conduct which we claim is unlawful." The record does not support this allegation.

In *American Tobacco,* the Court said:

> "The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in any exchange of words. (Citation omitted). *Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding,* or a meeting of minds *in an unlawful arrangement,* the conclusion that a conspiracy is established is justified." Id. at 809-810. [Emphasis added.]

However, in the case before us, the requisite circumstances for such a finding are not present. While inferences are permissible in establishing such an unlawful course of conduct (See *American Tobacco, supra*), plaintiff's case is supported by inference drawn from inference based upon inference, supported by facts which are themselves mere conclusions, and inferences drawn from other facts.

Plaintiff readily admits that there is no evidence of any formal arrangement or agreement among these defendants to deprive plaintiff of wire service. (Brief, p. 26). Plaintiff's efforts to establish its case by pointing to a history of "unlawful" contracts, it must be observed at the outset, is not persuasive, particularly in the complete absence of any such "unalwful" agreement in this case.

Plaintiff bases its complaint on the following allegations:

a) UPI was willing to deal with plaintiff or with other new newspapers, only on terms alleged to be so onerous and unreasonable as to be impossible of satisfaction

b) That UPI readily dealt with those who were not in competition with existing customers on terms, it is said, far more generous than those offered plaintiff

c) That UPI was unwilling to sell to plaintiff at any price

d) And that UPI refused to sell individual services and insisted on a package contract

e) That UPI conduct was against its own pecuniary interest but could economically benefit the News and the Free Press by insuring that a new competitor (apparently meaning this plaintiff) would not come into existence in the city

f) And that the inability of plaintiff to obtain UPI service because of defendant's wrongful conduct substantially damaged plaintiff. (Brief, p. 26).

The record is clear that whatever problem there was between UPI and plaintiff was not considered of any great importance to, or in fact any business of, the defendant newspapers. (See, e.g. Hills Dep. 32). Representatives of both the News and the Free Press told plaintiff that their papers had no objections, to a contract between UPI and plaintiff, felt it was no concern of theirs, and did not want to get mixed up in it. They felt it was a matter between UPI and the Daily Press.

Depositions from both plaintiff and defendants agree on this point.

Mr. Dworkin (Michael G. Dworkin, President, Editor and Publisher of plaintiff) was asked if he knew of any action taken by either of the defendant papers or UPI to prevent them from getting service. He replied that "I

know of no direct acts other than things which were related to me in the form of rumors." (Dworkin Dep. 198-99). Nor did he conclude from these rumors that Daily Press would not get wire service. (Dworkin Dep. 194). Mr. Dworkin also testified that he did not have any such knowledge gained through any investigation of the defendant's actions. (Dworkin Dep. 199).

In fact, none of the plaintiff's deponents knew of any activities on the part of any of the defendants herein which were directed toward the prevention of their obtaining wire service. (See, e.g. Curtis C. Haseltine, City Editor of Plaintiff, Dep. 22-23; Frank P. Gill, Executive Editor of Plaintiff, Dep. 84-86; Dworkin, *supra,* Dep. 86, 87, 194-203; Irving G. Hershman, Director and Financial Editor of Plaintiff, Dep. 25; Gary Stern, Chairman of Plaintiff's Board of Directors, Dep. 18, 29-30). Some of plaintiff's deponents who were not directly involved in the negotiations with UPI thought that the approval of the other papers was necessary, due no doubt to an erroneous report to Mr. Dworkin by an Assistant Manager in UPI's Chicago office that while no approval was necessary for a "normal" contract, it might be for a dissimilar contract.[3] (Gary Stern Dep. 17; Siegel Dep. 41, 45). Mr. Gill didn't know whether or not this was the case and as a result

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[3] An unidentified man (later identified as Peter Willet, temporary assistant to Mr. Johns in the Chicago office) (Johns Dep. 13) informed Mr. Dworkin that they could not service one paper in a town on different terms than already existed as to other papers. He also said that if the News and Free Press didn't care they might be able to give them a dissimilar contract. (Dworkin Dep. 82-84).

Plaintiff was later informed by the Chicago manager, Mr. Johns, that they had been "grossly misinformed" by the assistant who had been under the impression that Mr. Gill (Executive Editor of plaintiff) had some connection with the Detroit newspapers and that they were involved in the venture to start a new paper. (Johns Dep. 13; Dworkin Dep. 88).

called the defendant papers to check (Gill Dep. 82) and was told that they didn't care.

Mr. Dworkin testified that UPI told him that Daily Press could have service, but on normal terms such as were given to the other papers in the same city since UPI couldn't service a paper in the same city on different terms than others in the same area, unless the other papers didn't care. (Dep. 86-87). Assuming this to be an accurate statement of UPI's position, and there is some doubt due to the erroneous statements of the Assistant Manager which got the parties off to a bad start in their first contacts, *it is clear that the other papers did not care.*

Both the News and the Free Press told Mr. Dworkin that they wanted no part in whether or not UPI sold them service. (Dworkin Dep. 86-87). He was also told by Mr. Johns of UPI that their negotiations had nothing to do with defendant papers and that whether they agreed or disagreed was immaterial and that all that was necessary for them to get a contract would be to conform to certain stated contract terms[4] (Dworkin Dep. 88) which Mr. Dworkin felt were too extravagant. It should be noted that Mr. Johns also testified that he had no conversations with either of defendant papers regarding service to Daily Press. (Johns Dep. 35).

Mr. Haseltine, plaintiff's City Editor, testified that he had no knowledge of any attempts on the part of any of the defendants to prevent the completion of a contract for wire service. (Haseltine Dep. 22). In fact, he testified that he thought Mr. Gill (executive editor of plaintiff) was a "damn fool" for starting the law suit and that he felt UPI had a right to sell its product to whoever it wanted

[4] The terms included a 5 year contract at a rate of $2,400.00 per week and included a deposit requirement. (Dworkin Dep. 88; Thomason Dep. 131).

and certainly had a right to refuse an *interim* newspaper because of the risk of offending their regular customers (Haseltine Dep. 27) and that Mr. Gill tended to agree with this opinion. (Haseltine Dep. 31).

Mr. Lee Hills of the Free Press testified that he told Mr. Gill that the Free Press had no objection to any arrangement between UPI and Daily Press, and in fact offered to get in touch with Mims Thomason of UPI for him at his New York office. (Hills Dep. 30-31). He also testified that there were no further discussions about this because it was not a matter of great importance to them and the papers were in the middle of constant negotiations. (Hills Dep. 32).

Mr. Gill's testimony agrees. He testified that Mr. Hills did not in fact object and readily gave him Mr. Thomason's private phone number in New York. (Gill Dep. 53; Hills Dep. 35). Mr. Hayden of the News also told Gill that they had no reason to object to any arrangement between Daily Press and UPI and didn't want to get mixed up in it or have anything to do with it. (Gill Dep. 53).

Mr. Clark, President, Director and Publisher of the News, discussed the matter briefly and concluded that it was irrelevant and none of their business. (Clark Dep. 12). Mr. Patton (former Managing Editor of the News) checked with his superior, Mr. Hayden (feeling that the discussion was out of his jurisdiction) and was told that Mr. Hayden felt it was none of their business and there were, of course, no objections. There were no other discussions on the subject and he reported Mr. Hayden's opinion to Mr. Gill. (Patton Dep. 9-14).

Plaintiff implies in his brief (p. 33) that representations were made that Mr. Patton and Mr. Hills of the Free Press could not tell Mr. Gill, as a fact, that they had no voice

in passing on the question of whether UPI could sell to Daily Press. This implication is not supported by the record in any fair reading. What these gentlemen actually did, considering the record as a whole, was to tell Mr. Gill that they would consult their superiors. Their superiors reported that, as far as they had any voice in it, they considered it none of their business and even (through Mr. Hills) encouraged it. (Thomason Dep. 130, 151).

Mr. Thomason of UPI testified that he had gotten a call from Mr. Hills who told him that the Free Press had no objection to any arrangement between UPI and Daily Press (Thomason Dep. 130) and he even got the impression that Hills was encouraging it. (Thomason Dep. 130, 151). Mr. Hills told Thomason that Mr. Gill was an old, close friend and that Mr. Thomason could rely on what he represents himself to be and what he is representing. (Hills Dep. 30). He told Thomason that Gill is not "fly-by-night" and is a professor at the University who was involved with a group which was attempting to start a new newspaper and wanted to buy UPI service. (Hills Dep. 30-31).

Mr. Thomason had no discussions with the News until after this suit was filed. (Thomason Dep. 144-147).

Mr. Johns of UPI told Mr. Dworkin that there was no strike clause in their contracts with the other papers[5] and

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[5] In fact, the agreement between UPI and Knight (August 13, 1955) reads in part:

> "Fifth. It is mutually agreed that United Press reserves the right to make working arrangements and exchanges of news and wire facilities with other press associations, publishers and persons *and to sell said news report to any other party or parties.*" [Emphasis added.]

The Evening News Association has a similar provision ("Fifth") in its contract dated March 8, 1934, effective date March 12, 1934, and in effect at the time in question.

that they could sell their services to whomsoever they pleased whenever they pleased. He could see no reason why Daily Press should not have service. (Dworkin Dep. 83).

It is reasonable to assume that this statement was made on the assumption that the contractual terms could be worked out. It is not reasonable to conclude from this statement, as plaintiff would suggest, that because a contract was not later concluded, there had to be an unlawful reason for it.

Mr. Dworkin apparently felt that there was a conspiracy on the part of the defendants to prevent him from getting wire service because in his judgment the terms offered were "extravagant" and, moreover, he felt that the wire service knew that Daily Press could not meet them, and that even when they finally offered to meet them they were unable to reach an agreement. (Dworkin Dep. 193-4).

We find no evidence of any kind to support the existence of such a conspirary, concert of action, contract or agreement, express or implied.

It is clear to this Court on the record before it, as submitted by both parties, that defendant newspapers had no objection, in fact, did not care, what agreement if any was worked out, felt it was none of their business and were too much involved in constant negotiations to end the strike to worry about it. Mr. Hills' good offices to Mr. Gill in contacting Mr. Thomason (giving Mr. Gill his private number and vouching for him) also cannot be overlooked.

Plaintiffs offer nothing but unsupported allegations to support any contrary conclusion.

It should be noted that, as to the various family and business relationships as to which plaintiff attributes suspicious motives, (Brief, p. 12), there is no support for this argument on the record herein.

B) *That UPI Declined to Sell its Services to Plaintiff Against its Obvious Economic Self Interest.*

We find no support for the premise from which plaintiff expects this Court to supply missing ingredients in its cause of action, namely that it was against the economic self interest of UPI to refuse to deal with Daily Press.

Why? In what manner? As the record shows, and this fact is uncontradicted, this fledgling newspaper was dependent for its term of existence upon the resumption of service by the other papers, and as a result could at any time last for two days, two weeks or two months, depending upon the progress in negotiations settling the newspaper strike.

It is clear that UPI was unable to conclude a contract due to at least two reasons which are inter-related. In the first place, UPI offered its service on certain terms, which terms were thought to be extravagant by the offeree. Why? In large part because of the uncertainties arising from the fact that, concededly, the offeree was an *interim* newspaper. The effect of its interim status is indicated by Mr. Thomason, who testified as quoted below, that he saw no reason to call the Evening News after talking with Mr. Hills of the Free Press:

> "I might expand on that by saying that if there were an interim newspaper in Detroit today, I would not sell an interim newspaper whether the other two papers were on strike or not on strike. I would not sell it on an interim basis even if encouraged to do so

by the Detroit News and the Detroit Free Press." (Thomason Dep. 152).

This was not the situation at the time of the complaint, at which time he was willing to sell on what were to him reasonable business terms. Offers were made by UPI and rejected by the plaintiff. Counter-offers were attempted but no contract was concluded. Plaintiff was in the unfortunate position of trying to bargain for a service when it did not know just how long the service would be needed, or whether, in fact, it would be in existence the next week. We fail to see (and we have not been shown) the economic interest on the part of UPI which would indicate that a contract should be concluded with a newspaper which, by its own admission, might not last out the week. It might be a different situation if Daily Press had ever had any intention of even attempting to outlast the strike, but on this the record is clear. Daily Press was created to fill the void caused by the strike. It intended to fold its tent with the end of the strike, at which time its officers and employees would go back to their normal jobs on the defendant papers or elsewhere. Negotiations at this time were constant and the strike could end any time. Is it in UPI's economic self interest to assume, as was possible, that the strike would last a long time and this would be a customer worth having? The record clearly indicates that as self-admitted interim newspaper, fulfilling a vital need in the City of Detroit, Daily Press was not such a customer.

Mr. Gill testified that during the course of his conversation with Mr. Thomason he objected to the offer made because "this is absurd because we don't know how long we're going to be in business." Mr. Thomason told him that "Those are our regulations." "I'd like to be able

to do something else but I can't. This is our rule."[6] (Gill Dep. 55).

The conversation between Mr. Gill and Mr. Thomason continues as reported by Mr. Gill in his deposition:

> "I said. 'This is silly because, as I say, we don't know. We may last a month; we may last two weeks; we may go on for six months, I don't know. This looks like a long strike.'
>
> Q. What was the reason for your reference to the strike?
>
> A. Because that's the only reason we were in existence was the strike.
>
> Q. Did you intend to go beyond the strike?
>
> A. No." (Gill Dep. 55).

Mr. Gill also told Thomason that they were an interim paper and did not intend to stay in business. (Gill Dep. 83, 131-32). He himself planned to go back to his teaching in September. (Thomason Dep. 130-132). Actually, also, as respects the interim status of the Daily Press, Mr. Dworkin testified that the paper was largely staffed with laidoff advertising and editorial employees of the Free Press (Mr. Thomason felt this was why Mr. Hills was encouraging a deal between UPI and Daily Press (Thomason Dep. 151)) and its circulation was handled by laid-off circulation employees of the News. (Dworkin Dep. 62, 224-227).

The plaintiff also alleges that UPI "has also failed to explain the incriminating statement made by its Assistant Manager, Peter Willett, to Dworkin, that the Daily Press

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[6] It is interesting to note that Mr. Hills of the Free Press got a similar answer from Mr. Thomason when he tried to arrange an adjustment in their contract because of the fact that they weren't getting any copy during the strike. (Hills Dep. 63).

must get the consent of the News and Free Press before UPI could service it on reasonable terms." The plaintiff argues that although this statement was later repudiated by Mr. Johns, Willett's superior, it was because "he [Willet] did not know how to smoothly communicate an unlawful refusal to deal by putting it in the framework of impossible conditions." (Brief, p. 33).

We may assume at this point for the purposes of analysis that the statement was made by Mr. Willett and was not repudiated by his superior for the reasons discussed earlier. Plaintiff has painted Mr. Willett's statement with a heavier brush than the record supports. A reading of the record shows that what UPI's representative *actually* said was that before UPI could give plaintiff a contract based upon terms which were entirely different from that already contracted for by the already existing papers in the city, it would consult with them. If a contract was contemplated which was similar to those already entered into with the News and Free Press this wouldn't be necessary. The reason was not to get the "permission" of these papers so that it could service defendant on its "reasonable" terms. It should also be noted that the characterization "reasonable" is solely that of the plaintiff and nowhere is there any evidence that the plaintiff's proffered agreement was "reasonable" from defendant's point of view. The papers were to be consulted because it was UPI's custom to so do. We think this is merely the exercise of good business sense and in no way violative of the laws involved herein nor in any way supportive of plaintiff's theory. UPI had only two customers in this area and it is reasonable to this Court that before offering a third customer in the same area a contract on different terms than that which bound the two original customers, UPI would want to consult with its

present customers not only for their reactions but, possibly, with a view towards amendments. Plaintiff asserts that Mr. Thomason testified that UPI was "fearful" that its "regular" customers would object if interim newspapers were given short-term contracts. This is not the Court's reading of this testimony. Mr. Thomason testified that plaintiff demanded a contract on terms which were entirely different from those which defendant newspapers had, and that it was a matter of concern that an entirely different contract would be offered to plaintiff. It is a matter of simple business judgment that the sale of the same service in the same city to one customer on an entirely different basis as that service to another customer may bring about some dissatisfaction from the first customer. We find nothing sinister in this, despite plaintiff's interpretation of Mr. Thomason's testimony. Certainly, UPI, as a business organization, hesitated before deciding whether or not to capitulate to plaintiff's stated contract terms, and it did so for good business reasons.

It must be recalled here as well that UPI did *not* contact either paper, the Free Press called UPI on behalf of Plaintiff and "encouraged" the sale of service to it by vouching for Mr. Gill of Daily Press and, after giving Mr. Gill the private number of the man to contact at UPI, both papers told Mr. Gill that they did not have any objections to UPI service for Daily Press and in fact felt it was none of their business. It appears, as well, that Mr. Johns, Willett's superior at UPI contacted neither parey and told Daily Press that the negotiations were between UPI and that paper.

There is no evidence here, as plaintiff asserts, "of an unlawful refusal to deal." Plaintiff would have this Court force defendant UPI to offer its services to the plaintiff on whatever terms plaintiff demanded and stamp a rejec-

tion of those terms as "unlawful." Reasonable terms to plaintiff are not necessarily "reasonable" terms from the point of view of Defendant.

Plaintiff has not shown any combination in restraint of trade, (see (a) *supra*) and since there is no evidence in the record to support it, plaintiff relies on "economic self interest" to supply the missing evidence and the missing agreement.

The Court finds that there was no indication of any kind in this record of an unlawful refusal to deal or that such refusal to deal with this paper whose existence was admittedly so tenuous was against the economic self interest of UPI. Clearly, the case for economic self interest is far too weak to support all of the other conclusions (unlawful concert or combination, conspiracy, unlawful refusal to deal) which plaintiff would have flow from it.

C) *In Order to Eliminate Plaintiff as a Potential Competitor of Two of its Largest Customers.*

Plaintiff argues that it was "virtually impossible for a daily newspaper to exist without subscribing to one or more national wire services" (Complaint II, III) and that "to obtain maximum circulation and remain competitive" it must have access to all news sources. While on its face this seems to be a reasonable position, plaintiff ignores two extremely important and uncontradicted facts, ie., that plaintiff did not intend to continue after the regular newspaper resumed publishing, and that plaintiff, intending to exist only during the strike, *had no competition* which had access to "all news sources."[7] Plaintiff cannot, in a cava-

[7] It was widely believed among Mr. Hills' colleagues that the interim papers got their news by stealing them off the radio from the wire reports there. (Hills Dep. 43).

lier manner, thus brush off the undisputed fact that it did not enter the publishing business to be a competitor to any existing paper but merely intended to fill the void created by the strike and furnish a service to the readers of the metropolitan Detroit area.

Plaintiff cannot now say that it was a "competitor," trying to ve a "viable" publishing organization, nor can it assert that its circulation or advertising revenues were hurt because it did not have the same news source as its competitors. Plaintiff had no competitors among these defendants. Defendants were not publishing and plaintiff made it clear, over and over again, that it would cease publication as soon as the need for it ended, i.e., at the end of the strike. The other interim publications had no contract with UPI and they were the only "competition' 'this plaintiff had and would ever have.

Nor can the plaintiff substitute a new set of facts for those actually in existence at the time of the acts in question. Plaintiff cannot now claim to be a competitor in the face of this record merely to support its otherwise unfounded allegations that the defendants acted in concert out of reasons based on business competition. There was no competition. Plaintiff did not intend to publish after the strike and the defendants knew that it did not. We cannot now all pretend that the facts were otherwise.

Plaintiff ceased publication *immediately* upon resumption of publication by the News and the Free Press. It did not attempt to compete with these papers for even a single day. Plaintiff went out of business on November 22, 1964 and did not publish on the 23rd. This Complaint was filed on November 20, 1964. The News resumed publication on November 25th, the Free Press on November 24th, 1964.

Even if long-tterm wire service contracts could have some deleterious effect upon the growth of new newspapers, (Brief p. 36) plaintiff was not in the position of a new newspaper which could be harmed in this way. A "new newspaper" which planned to continue in business for some time would have been in a much better bargaining position and may have concluded a contract with defendant UPI. This cannot be compared with the bargaining position of an "interim" newspaper such as plaintiff. Plaintiff does not allege (nor could the record support such an allegation) that the reason it was merely temporary was because of its failure to get wire service.

Plaintiff quotes a statement by Defendant Knight in objections to interrogatories that "plaintiff is a competitor of Defendant Knight" and was "avidly seeking to secure knowledge of the intimate business activities and workings of this defendant's newspaper business . . ." (Objections, November 4, 1966). (Pg. 13, Pl. Brief).

Plaintiff asserts that

> "Moreover, while the principals of the Daily Press did not, at the time the paper began, contemplate publishing aftter the strike terminated, it is reasonable to assume that the News and Free Press were concerned about the possibility of such a new competitor entering the market." (Plaintiff's Brief, p. 12-13).

This assumption is supposed to follow from a statement made by one of the defendants in Objections to Interrogatories filed during the course of this litigation. It is common knowledge that individual newspapers are in some difficulty and each year sees the death of another old established paper. These papers are not driven out of business by some upstart publication, however, for they simply die.

It is not "reasonable to assume" that the defendants were worried about the advent of a new paper. And, this "concern" cannot be supplied by a statement made in the middle of litigation when the facts are clear that at the time in question, with which time, only, this Court is concerned, this plaintiff had no plan, as it admits even now to continue past the end of the strike.

Certainly, once plaintiff filed this action stating that it was a "competitor" of the defendants, defendants might have reason to take plaintiff's word for it, although at the time of the incidents in question plaintiff at every junction stated to all that it would go out of business as soon as the other papers were able to resume publication. In view of the fact that this was stated to be the case, plaintiff was a competitor neither for employees (who would reasonably be expected to return to their original employers when plaintiff closed down at the end of the strike, as it said it would, and did) nor for customers for the same reason. Defendants were not publishing, they were closed down. They could not and did not compete with plaintiff. Plaintiff at no time, according to the record, purported to be anything but an interim newspaper and at no time did plaintiff assert that it meant to continue in business as a competitor to the other two daily papers.

THIS COURT CANNOT SUPPLY "COMPETITION" AT THIS LATE DATE.

Plaintiff did not support his charge of a violation of Section II of the Sherman Act. Plaintiff must show a conspiracy or combination, relevant market and injury, and some evidence that defendants engaged in conduct which would have, if successful, resulted in monopolization or if unsuccessful, a "dangerous probability" of the realization of monopoly power. *American Tobacco Company v. United*

States, 328 U.S. 781, 785 (1946). Defendants are not competitors of plaintiff, nor have they been shown to have entered or contemplated an unlawful agreement or action directed toward an unlawful purpose, i.e. monopolization.

For the reasons discussed above, the motions for summary judgment filed by all defendants herein are granted.

It is so ordered.

/s/ Talbot Smith
United States District Judge

APPENDIX B

No. 18723

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

The Daily Press, Inc., *Plaintiff-Appellant*, v. United Press International, The Evening News Association, Knight Newspapers, *Defendants-Appellees.*	Appeal from United States District Court for the Eastern District of Michigan.

OPINION

Decided June 20, 1969.

Before: WEICK, Chief Judge, O'SULLIVAN and MCCREE, Circuit Judges.

WEICK, Chief Judge. The controversy in this anti-trust case arose out of a strike which closed down Detroit's two major daily newspapers for about four months. One week after the strike started, plaintiff, The Daily Press, Inc. [Daily Press], was incorporated under the laws of Michigan to publish an interim newspaper in Detroit for the duration of the strike. Publication was commenced on July 22, 1964, and ceased on November 22, 1964, when the

strike ended.[1] Two days before publication ceased, Daily Press filed the present suit in the District Court against the struck newspapers, The Evening News Association, publisher of the Detroit News [News], Knight Newspapers, Inc., publisher of the Detroit Free Press [Free Press], and United Press International [UPI], a corporation engaged in worldwide gathering of news and selling of same to newspapers and other media.

In its complaint, plaintiff's claim was blown up out of all proportion. Stripped of verbiage the nub of the claim was that UPI refused to furnish plaintiff with its wire services during the strike, and that the News and Free Press had induced UPI to take such action, all as part of a conspiracy on the part of the defendants to restrain competition and to monopolize news services, newspapers and newspaper advertising, in violation of Sections 1 and 2 of the Sherman Act,[2] for which plaintiff sought to recover damages of $2,500,000, trebled to $7,500,000 under Section 4 of the Clayton Act.[3]

The defendants answered separately, denying that they participated in a conspiracy and denying that they restrained competition or attempted a monopoly. Extensive discovery ensued, in which officers and employees of all of

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[1] Daily Press was a very successful venture. Its editorial and advertising staffs were made up largely of employees of the Free Press, and circulation was handled by idled employees of the News. They all intended to and did return to their jobs when the strike was over. Daily Press earned over $1.8 million in advertising revenue, and $1.1 million in circulation revenue, in the short period (four months) of its operations. Salaries of $90,000 were paid to its three officers, who along with other shareholders withdrew $414,650 of plaintiff's net income, leaving $51,103.32 in retained net income. It claims it was damaged in the amount of $2,500,000 because it had not been furnished the UPI wire service.

[2] 15 U.S.C. §§1 and 2.

[3] 15 U.S.C. §15.

the parties were deposed, affidavits were filed and many documents and papers were produced.

The defendants then filed separate motions for summary judgment, which the District Judge considered upon depositions, affidavits, and exhibits.

The District Judge, in an opinion appearing in twenty-five pages of the record, determined that there was no genuine issue as to any material fact; and that the charges in the complaint were unsupported by the evidence and were wholly unfounded. He granted the motions for summary judgment and dismissed the complaint. On appeal the principal point urged upon us by appellant is that the District Court ought not to have disposed of the case on summary judgment.

The Supreme Court in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), held that summary judgment should be used sparingly in complex antitrust litigation. It enunciated the following rule:

> "Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case 'show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Rule 56(c), Fed. Rules Civ. Proc. This rule authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.'" *Id.* at 467.

W followed *Poller* in *Southern Blowpipe & Roofing Co v. Chattanooga Gas Co.*, 360 F.2d 79, 81 (6th Cir. 1966), and in *Alles Corp. v. Senco Prods., Inc.*, 329 F.2d 567, 572 (6th Cir. 1964).

It should not be understood, however, that Rule 56 of Federal Rules of Civil Procedure governing summary judgment is inapplicable in antitrust cases. The rule applies in all civil actions.

The Supreme Court recently applied the Rule in *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 284-290 (1968), and affirmed a summary judgment in a complex antitrust case which had been pending for more than eleven years. It distinguished *Poller*, where the competitive relationship between the parties was such as to make plausible plaintiff's argument that the defendant had embarked on a plan designed to put him out of business. In the present case it would be presposterous for plaintiff to make any such claim. Mr. Justice Marshall, who wrote the opinion for the Court, stated:

> "The case at hand presents peculiar difficulties because the crucial issue of fact to petitioner's case is also an issue of law, namely the existence of a conspiracy. What Rule 56 (e) does made clear is that a party cannot rest on the allegations contained in his complaint in opposition to a properly supported summary judgment motion made against him.[19] Yet the analysis of the facts undertaken above demonstrates that, due to the absence of probative force of Cities' failure to deal with Waldron as being in itself evi-

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"[19] Indeed it was for the precise purpose of overturning a line of cases in the Third Circuit holding that a party could successfully oppose summary judgment by relying on his well-pleaded allegations that Rule 56(e) was amended in 1963. See 6 Moore, Federal Practice ¶56.22[2], at 2821 (2d ed. 1966)."

dence of conspiracy, petitioner's position is, in effect, that he is entitled to rest on the allegations of conspiracy contained in his pleadings. Thus petitioner repeatedly states that Cities has never disproved its participation in the alleged conspiracy, despite the fact that the only evidence of such participation is his allegation that the failure to deal resulted from conspiracy.

Essentially all the lower courts held in this case was that Rule 56 (e) placed upon Waldron the burden of producing evidence of the conspiracy he alleged only after respondent Cities Service conclusively showed that the facts upon which he relied to support his allegation were not susceptible of the interpretation which he sought to give them. That holding was correct. To the extent that petitioner's burden-of-proof argument can be interpreted to suggest that Rule 56 (e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it. While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an anti trust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint." *Id.* at 289-290.

We approved the granting of summary judgment in the antitrust case of *Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F.2d 283 (6th Cir. 1963), *cert. denied*, 375 U.S. 922 (1963), *rehearing denied*, 375 U.S. 982 (1964).

We do not regard the issues in the present case as complex. The case does not even involve a refusal on the part of UPI to sell its services to Plaintiff. The refusal was only its refusal to sell on terms proposed by plaintiff who was unwilling to buy on regular UPI terms.

The difficulty with plaintiff's position is that plaintiff intended only to fill the void created by the strike. It did not know how long the strike would last, whether one or two days, a week or a few months. When the strike was over it would lose its employees (who intended to and did return to their jobs with the News and the Free Press) and plaintiff would fold, as it did. In this precarious situation, plaintiff could make only short-term commitments.

On the day of its organization, Michael Dworkin, president and publisher of the Daily Press, telephoned the central division office of UPI in Chicago, spoke to the assistant central division manager (later identified as Mr. Peter Willett), and advised him that Daily Press was interested in obtaining UPI service.[4] Dworkin asked whether there was such a thing as a strike clause in UPI's contracts with the Free Press and the News. Dworkin testified that Willett said that there was no such thing as a strike clause; that UPI could sell its services to whomever it pleased; and that he did not see any reason why the Daily Press could not have its service.

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[4] Plaintiff endeavored to obtain news service from New York Times News Service, New York Herald Tribune Service, Chicago Tribune, Christian Science Monitor, Los Angeles Times—Washington Post News Service, New York Post, and Canadian Press. All of these efforts were unsuccessful. Plaintiff did obtain service from Reuters on a week-to-week basis and Dow-Jones financial service on a month-to-month basis. It also obtained various nationally distributed features such as comics, columns and puzzles on month-to-month and ninety-day bases, and printed news which it gleaned from radio broadcasts. Plaintiff made no attempt to obtain Associated Press [AP] service because of undue delay believed to be involved in acquiring voted membership in AP.

Dworkin testified that they then discussed the mechanics of acquiring UPI service. At this point Willett stated that Daily Press would have to sign a contract similar to the one which UPI had with the News and Free Press. According to Dworkin, Willett said:

> "We cannot go into a town and service a newspaper on terms different than those we are servicing to the newspapers already."

Willett stated further:

> "I will tell you what, though, if you can get the News and the Free Press to agree to our servicing this on a contract dissimilar from theirs you can have the service as soon as we can install it."

Dworkin advised Frank Gill, Executive Editor of the Daily Press (and Professor of Journalism at Wayne State University), of this conversation and suggested that Gill contact the News and Free Press to obtain the necessary clearances.[5] Gill indicated that he knew both Lee Hills, publisher of the Free Press, and Harvey Patton, Manager-Editor of the News. Gill did call Patton, who told him:

> "So far as the News is concerned this is a matter that concerns only you and United Press International. We want to have nothing to do with it. We don't want to be connected with you or your negotiations with United Press in any way whatsoever. If they want to sell you the service that is their business. We want no part of it."

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[5] Gill testified that he made the suggestion because he did not know what the regulations were with regard to UPI.

Patton also said that there would be no repercussions from the News.

Lee Hills told Frank Gill that the position of the Free Press was the same as that of the News. Gill testified that Hills told him: "We see no reason to stop you." Hills testified that he told Gill:

> "We have no objections at all and have no reason to object to such a newspaper as you are talking about buying United Press International."

Hills gave Gill the private telephone number in New York of Mr. Mims Thomason, President of UPI, so that Gill could contact him about obtaining service.

Mims Thomason testified that Lee Hills had telephoned him to advise that Professor Frank Gill of Wayne State University, who was associated with Daily Press, had called him (Hills) to inquire concerning the purchase of UPI news service; that Hills had referred Gill to Thomason; and that Thomason would be hearing from him. Thomason further testified that Hills told him:

> ". . . [A]s far as the Free Press was concerned, they had no objection at all, of course, to our selling the Detroit Daily Press."

Thomason was of the impression that Hills wanted UPI to sell its services to the Daily Press.

Dworkin called Dale Johns, UPI's Central Division Manager in Chicago and related Gill's conversations with Patton and Hills. Dworkin claimed that Johns told him that he (Dworkin) had been grossly misinformed by Willett; that UPI's negotiations with Daily Press had nothing whatsoever to do with the News or Free Press;

and that whether the newspapers agreed or disagreed was immaterial to UPI.

Dworkin said that Dale Johns then outlined UPI's proposed contract terms for the plaintiff, which terms included a five-year contract, with the last year of the contract to be paid in advance as a deposit, and with a rate of $2400 per week.[6]

Dworkin then asked Frank Gill to call Thomason, UPI's president in New York, in an endeavor to go over Dale Johns' head. Gill testified that he called Thomason, who told him that he (Gill) had been misinformed by Willett; that UPI was guided by its own regulations or policy, which included a five-year contract with the last year to be

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[6] Dale Johns described this conversation as follows:

"He [Dworkin] said that he and some others had started or were starting a daily newspaper in Detroit, and he wondered about buying our services. I asked him what field he was in, whether in the morning or evening field, and if this was a general circulation paper in the City of Detroit—the usual questions about what the operation would be like, and told him we would be glad to serve him.

"We had certain requirements about newspapers he would be expected to meet, and then it developed he did not intend to publish this newspaper, you know, except on a day-to-day basis until the newspaper strike in Detroit at that time ended.

"So I just told him we could not do this, that we did not sell our services on a day-to-day basis, or week-to-week basis. This just about terminated the conversation. I think there was some general conversation at that time about cost. He wanted to know something about what it might cost. I believe I gave him a round figure that it might cost as much as $2400 a week. I think at some time I used that same maximum for all services he might want to use.

* * *

"* * * I told him that our requirement for a newspaper was a five-year contract with the last year paid in advance, and we had to have guarantee of 85 per cent paid circulation, that it would be helpful if we had a financial statement * * *

"* * * When it was determined we couldn't serve him on a day-to-day basis, that terminated the conversation * * *."

paid in advance. Thomason told Gill that UPI service would cost $2480 per week on a five-year contract, with the fifth year to be placed in escrow before they started. Gill replied: "This is absurd, because we don't know how long we're going to be in business."

Thomason then said:

> "Those are the regulations . . . I'd like to be able to do something else, but I can't. This is our rule."

Gill replied:

> "This is silly because, as I say, we don't know. We may last a month; we may last two weeks; we may go on for six months, I don't know. This looks like a long strike."

Thomason recalled this conversation as follows:

> "* * * Our conversation was rather brief, because he told me immediately that this was an interim newspaper, that there was no intention of publishing it permanently, but, nevertheless, he wanted to know the general terms and conditions.
>
> And I told him. I inquired first as to whether he was going to publish an afternoon paper or a morning paper, and how many days, and told him that the rate would depend upon which field he was in; and if it was to be six days only, it would be either six-sevenths of the Detroit News rate or the morning rate, six-sevenths of the Detroit Free Press rate. I said we would have to be assured of financial stability, that the circulation was at least 85 per cent paid, and that we would require a normal five-year contract and a deposit guaranteeing performance on the contract equal to the amount of the fifth year's contractual rate."

Thomason testified that the News was not mentioned in the conversation. He further said that if there were an interim newspaper in Detroit today, he would not sell to it regardless of whether the other two newspapers were on strike, or whether he was encouraged to do so by them.

UPI's reason for seeking five-year contracts for its news service was explained by Thomason as follows:

> "We have to have the stability of a long-term contract, and we cannot afford to make exceptions. We must have long-term contracts. If we were to write a contract with a newspaper on a week-to-week or a month-to-month basis, we would then be compelled to extend the same short-term cancellation privilege to many other newspapers. We cannot be in a position of spending about a million dollars a week covering news of the world and having our newspaper clients decide that the news is very dull this month, we will do without UPI; but then to have the war crank up again some place and then have the subscriber say, 'We will put it back in—We will take it.'"

The five-year contract was regarded by UPI as being of crucial importance. Mr. Thomason stated that it was "the most important thing that we have." Thomason expressed the view that short-term contracts with interim newspapers would "jeopardize our five-year contract program" because other UPI clients might request short-term cancellation privileges.

The *Daily Press* offered first $2,000, and later $3,000, a week, payable two weeks in advance, plus installation charges, for UPI's state wire, news pictures, and national wire services. This offer was rejected on the basis of UPI's policies.

In August, 1964, Daily Press again contacted both Dale Johns and Mims Thomason about UPI service and again the result was the same. UPI was unwilling to sell its service on terms other than a five-year cotnract. In addition, Thomason indicated that "when a newspaper goes into any town under any condition, we expect that paper to pay the existing rate paid by our client in that field and in that city." Thus, the rate to be charged was to be based upon the rate charged the existing newspapers in the morning or evening fields with proper modifications for the number of days per week the paper was to be published.[7]

In his talk with Dale Johns in August, 1964, Dworkin indicated that they were thinking about publishing a suburban newspaper at the conclusion of the strike, but apparently that was just an idea and they had no actual plans. Johns reiterated that UPI could not serve him on a day to day basis. Johns testified that near the end of the conversation, Dworkin said:

> " 'Well, really, we don't need your service anyway. . . . We are getting along fine. We have Reuters, the Dow-Jones Wire' and he [listed] some feature services, some feature picture services. He said he had correspondents in New York, Washington and some other cities . . . ."

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[7] The record is not clear as to the amount UPI was to charge Daily Press. Apparently UPI charged the Free Press (a morning newspaper) prior to the strike, $961.78 for A and B trunk wires, sports wire and business wire, and charged the News $1,981.74 per week for news service plus $650.59 per week for telephoto service. The lack of certainty in the record, however, has no real bearing on the alleged existence of a combination or conspiracy. Instead, it seems to indicate that the figures given were approximate, and that the parties never really reached a precise cost figure.

Dale Johns testified that a very small number of contracts for terms shorter than five years did exist, but that these were granted to established newspapers, and none to his knowledge was granted to new papers.

In October, 1964, Siegel of the Daily Press contacted UPI's Commercial Photo Division in an unsuccessful effort to purchase pictures of President Kennedy, Lee Harvey Oswald and his family, and Chief Justice Warren, to use in connection with a news story on the Warren Report. Mr. Thomason explained that spot news pictures are available only to regular customers. Other pictures are sold to anyone on an a la cartet basis.

UPI's 1934 news service contract with the News, which was for a term of five years, and was renewable for five-year terms, was modified in 1942 so as to extend for an indefinite term, with a one-year cancellation provision. The telephoto contract with the News was for a two-year term, and renewed itself unless either party cancelled the contract.

In 1955, UPI and the Free Press entered into a news service agreement for a term of two years. This agreement was modified in 1959 to provide for a five-year term with an "Asset Value Credit" provision by which UPI would give a five percent rebate at the end of each five-year term, provided Free Press did not cancel at the end of that period.

When the strike began, UPI immediately reduced the charges to the News and the Free Press by the physical cost savings of not having to transmit news to them. After three weeks, UPI reduced the charges for the services themselves by ten percent per week, so that after ten additional weeks UPI was receiving no revenue from either the News or the Free Press.

The separate written contracts between UPI and the News and the Free Press each provide in part:

> "It is mutually agreed that United Press reserves the right to make, working arrangements and exchanges of news and wire facilities with other press associations, publishers or persons and to sell said news Report to any other party or parties."

Plaintiff did not claim that there was any direct proof of any agreement, combination or arrangement on the part of the defendants to deprive plaintiff of wire services; neither do we find any circumstantial evidence from which inferences could properly be drawn, even tending to establish an agreement. In their depositions the knowledgeable officers and employees of plaintiff were interrogated on this subject, and none of them knew of any activities of defendants which were directed at preventing plaintiff from obtaining wire services. On the contrary, the sworn testimony of Harvey W. Patton and Peter B. Clark of the News, and of Lee Hills of the Free Press, was clear that they did nothing to interfere with plaintiff's acquisition of wire service from UPI. Lee Hills went even further. He tried to help plaintiff obtain such service. There was no proof of any discussion between the News and the Free Press concerning UPI's furnishing wire service to plaintiff.

The District Court properly characterized plaintiff's proof as follows:

> "[P]laintiff's case is supported by inference drawn from inference based upon inference, supported by facts which are in themselves mere conclusions, and inferences drawn from other facts."

There was not an iota of proof that either the News or the Free Press induced UPI not to sell its wire services to plaintiff. There was no proof of any conspiracy.

Plaintiff was never a competitor of the two struck newspapers, or of UPI. During the strike the News and the Free Press did not publish, and plaintiff had virtually a monopoly of the newspaper market in Detroit, and made the most of it. When the strike was over, plaintiff ceased publication and went out of business. The News and the Free Press then resumed publication. Plaintiff never was anything more than an interim newspaper.

Plaintiff sought to show by hearsay evidence that two days before the strike was over, Peter B. Clark of the News called the president of Wayne State University in Detroit, in an effort to put pressure on Professor Gill to terminate his employment with plaintiff. The University president did not so testify, and Mr. Clark denied that any such conversation ever took place. Hearsay evidence would not have been admissible in a trial of the case on its merits. It cannot be considered on a motion for summary judgment. Rule 56(e) Fed.R.Civ.P. Furthermore, the alleged conversation took place long after UPI had refused to sell its services on terms agreeable to plaintiff. There was no proof that UPI or the Free Press had knowledge of the alleged conversation.

Plaintiff, relying on *Milgram v. Loew's, Inc.*, 192 F.2d 579, 583 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952), argues that UPI acted contrary to its own economic self-interest in not accepting plaintiff's offer of $3,000 a week, payable two weeks in advance, and that this strengthens the inference of conspiracy, which it seeks to draw. We are unable to perceive how any economic self-interest of UPI, not common to the News or the Free Press, connects either one of them to a conspiracy.

The District Judge effectively answered the argument as to UPI when he said:

"... We fail to see (and we have not been shown) the economic interest on the part of UPI which would indicate that a contract should be concluded with a newspaper which, by its own admission, might not last out the week. It might be a different situation if Daily Press had ever had any intention of even attempting to outlast the strike, but on this the record is clear. Daily Press was created to fill the void caused by the strike. It intended to fold its tent with the end of the strike, at which time its officers and employees would go back to their normal jobs on the defendant papers or elsewhere. Negotiations at this time were constant and the strike could end any time. Is it in UPI's economic self interest to assume, as was possible, that the strike would last a long time and this would be a customer worth having? The record clearly indicates that as a self-admitted interim newspaper, fulfilling a vital need in the City of Detroit, Daily Press was not such a customer."

The fact that E. W. Scripps Trust own 2% of the common stock of the News and indirectly owns a controlling interest in UPI is no proof of any unlawful combination. We also fail to see the relevancy of the fact that Peter B. Clark, president and publisher of the News, is the great-grandson of James E. Scripps, founder of the News, and a half brother of E. W. Scripps, who was the founder of the predecessor of UPI.

When the motions for summary judgment were filed, plaintiff could no longer rely on the conclusory allegations of its complaint. Rule 56(e) of Fed.R.Civ.P. requires that a party opposing a properly supported motion for summary judgment shall produce by affidavit or otherwise "specific facts showing that there is a genuine issue for

trial." *First Nat'l Bank of Ariz. v. Cities Serv. Co., supra,* at 270. This, plaintiff was unable to do.

Our observations with respect to the alleged Section 1 violation apply with equal force to the claimed Section 2 violation. There was no proof that the News and the Free Press, individually or jointly, attempted to or did monopolize the market for news services, newspapers and newspaper advertising in Detroit, or that they agreed that no new newspaper of general circulation, published in Detroit, would be permitted to obtain UPI wire services, or that they or either of them attempted to prevent the organization of new newspapers or the continued existence of competing newspapers in Detroit by coercing wire services to refuse to service them.

There remains for consideration the question whether UPI's unilateral refusal to come to terms with plaintiff operated to violate Section 2 by monopolizing or attempting to monopolize the market for news wire services.

Contrary to its previous argument that it would have been to UPI's economic self-interest to accept plaintiff's offer of $3,000 a week, it now contends that it was up to UPI's self-interest to refuse to deal with plaintiff "to avoid any conflict with its large metropolitan daily customers." But no conflict existed here, because the News and Free Press were not publishing at the time and neither newspaper opposed UPI's dealing with plaintiff. The Free Press encouraged it.

It is settled that mere refusal to deal is not a violation per se of Section 2. *First Nat'l Bank of Ariz. v. Cities Serv. Co., supra.*

In *Ace Beer Distributors, Inc. v. Kohn, Inc., supra,* at 286-287, Judge Shackelford Miller, Jr., who wrote the opinion for our Court, said:

"A manufacturer has a right to select its customers and to refuse to sell its goods to anyone, for reasons sufficient to itself. United States v. Colgate & Co., 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992. A refusal to deal becomes illegal under the Act only when it produces an unreasonable restraint of trade, such as price fixing, elimination of competition or the creation of a monopoly. United States v. Parke, Davis & Co., 362 U.S. 29, 32, 80 S.Ct. 503, 4 L.Ed.2d 505; Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219; Lorain Journal Co. v. United States, 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162. The fact that a refusal to deal with a particular buyer without more, may have an adverse effect upon the buyer's business does not make the refusal to deal a violation of the Sherman Act. Damage alone does not constitute liability under the Act."

As we pointed out before, our case does not even involve a refusal to deal with plaintiff. UPI was willing to deal with plaintiff on the same basis as its other contract customers. Plaintiff, being an interim newspaper and thus not knowing how long it would be in business, wanted a special deal. Failure of UPI to give plaintiff a special deal and accept its offer of $3,000 per week, did not operate to create or attempt to create a monopoly.

It is not clear to us just how UPI's failure to come to terms with plaintiff could create a monopoly or could be an attempt to monopolize. The proof does not show that UPI had the power to control prices or unreasonably restrain trade.[8] There was no evidence of a specific intent

[8] Plaintiff submitted statistics which indicate that UPI has less than 50% of the national wire service market.

to monopolize. *Kansas City Star Co. v. United States*, 240 F.2d 643 (8th Cir. 1957), *cert. denied*, 354 U.S. 923 (1957).

At the time Mims Thomason's deposition was taken, UPI was not earning a profit and made no profit for the year prior thereto.

No tie-in is involved in this case for UPI made no contract with plaintiff.

Plaintiff claims that if it had had UPI's service it would have received much more advertising revenue. It did pretty well without it, namely, $1.8 million, in four months. We would think that its advertisers would have been concerned about how long plaintiff would remain in business, rather than worried about whether plaintiff had UPI wire service.

In our judgment, there was an entire failure of proof on the monopoly issue.

It is further contended that the Court did not permit adequate discovery. We disagree. Plaintiff had extensive discovery. In our judgment, additional discovery would not have affected the motions for summary judgment. We find no abuse of discretion on the part of the District Judge.

Affirmed.

APPENDIX C

JUDGMENT

Before: Weick, Chief Judge, O'Sullivan and McCree, Circuit Judges.

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendants-Appellees recover from Plaintiff-Appellant the cost on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

Carl W. Reuss,
Clerk.

Issued as Mandate:

COSTS: Awarded to Appellees.

Filing fee	$
Printing	$1037.65
Total	$1037.65
United Press International	$403.65
Evening News Association	164.00
Knight Newspapers, Inc...	470.00

A True Copy:

Attest:
Carl W. Reuss,
Clerk.